

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of:

Determination of Royalty Rates and Terms
for Transmission of Sound Recordings by
Satellite Radio and “Preexisting”
Subscription Services (SDARS III)

Docket No. 16-CRB-0001 SR/PSSR
(2018-2022)

**SOUNDEXCHANGE’S BRIEF IN RESPONSE TO
THE JUDGES’ APRIL 17, 2018 ORDER**

SoundExchange, Inc., the Recording Industry Association of America, Sony Music Entertainment, Universal Music Group, Warner Music Group, the American Association of Independent Music, the American Federation of Musicians of the United States and Canada, and the Screen Actors Guild and American Federation of Television and Radio Artists, (collectively, “SoundExchange”), through their undersigned counsel, hereby responds to the April 17, 2018 Order of the Copyright Royalty Judges (“Judges”) requesting briefing “identifying the ARPU and the resulting royalty rate . . . that [each] party alleges to be appropriate.” *Order Granting in Part and Denying in Part Sirius XM’s Motion for Rehearing*, Docket No. 16-CRB-0001-SR/PSSR (2018-2022), at 9 (Apr. 17, 2018) (“Order”).

SoundExchange does not agree with Sirius XM Radio, Inc. (“Sirius XM”) that there is any manifest injustice in refusing to set a percentage royalty rate based on “an ARPU and a specific analysis that Sirius XM never proposed.” Order at 6. However, should the Judges recalculate the royalty rate using an ARPU different than that used by both parties at trial and accepted by the Judges in their December 14, 2017 ruling (“Initial Determination”), then the appropriate ARPU would be [REDACTED], which implies a royalty rate of 16.85%. SoundExchange recognizes that the

Judges have limited their rehearing to a range of rates from 14.7% to 15.5%.¹ Given that the economically and conceptually accurate royalty rate exceeds this range, there is no sound basis to lower the rate from the current 15.5%.

This conclusion follows from the fundamental logic of the Judges' decision to use walk-away opportunity cost as the basis for setting a rate. *See* Initial Determination at 45. The Judges found that copyright owners and artists collectively incur an opportunity cost of [REDACTED] per subscriber when they grant Sirius XM a license to publicly perform the sound recordings that are subject to the statutory license. Copyright owners therefore would insist on receiving at least that amount in exchange for a license permitting Sirius XM to exploit sound recordings fixed after February 15, 1972 ("post-1972 recordings").

The Judges translated this per-subscriber fee into a percentage of revenue rate. *See* Initial Determination at 41-45, 57. Consequently, the percentage of revenue rate determined by the Judges, multiplied by ARPU calculated in a manner that is consistent with the definition of Gross Revenues, should equal [REDACTED] per subscriber.

Sirius XM has argued that the ARPU figure used by the Judges in their Initial Determination must now be adjusted upward to include certain transaction costs that Sirius XM previously deducted from its subscription revenue, plus all of the revenue that Sirius XM earns through its Premier and All Access subscription packages (the "bundled packages"). Because the Judges have ruled that Sirius XM must pay royalties on this revenue,² Sirius XM contends that the

¹ *See* Order at 9.

² *See* Initial Determination at 114, 126-27; Order at 11-12; *Amended Restricted Ruling on Regulatory Interpretation Referred by the United States District Court for the District of Columbia*, Docket No. 2006-1 CRB DSTRA (2007-2012), at 22-23 (Sept. 11, 2017) ("Ruling on Referral").

percentage of revenue rate must be calculated using an ARPU figure that includes such revenue.

What Sirius XM fails to consider, however, is that it does not pay royalties to SoundExchange on revenue associated with sound recordings fixed before February 15, 1972 (“pre-1972” recordings). The Judges clarified in their September 11, 2017 Ruling on Referral that, for the *SDARS I* period, Sirius XM was *not* required to include in Gross Revenues, and hence was *not* required to pay royalties on, revenue that Sirius XM attributes to the performance of pre-1972 recordings. Ruling on Referral at 17. There is no dispute that Sirius XM has continued to take a pre-1972 deduction since *SDARS I* and that this deduction (while computed differently) is mathematically equivalent to the Gross Revenues exclusion addressed in the Judges’ Ruling on Referral.³

Sirius XM’s one-sided proposal does not take this aspect of the Judges’ ruling into account. Just as the ARPU figure used to convert the per-subscriber opportunity cost into a percentage of revenue rate should *include* all revenue on which Sirius XM pays royalties, that ARPU figure should also *exclude* all revenue on which Sirius XM does *not* pay royalties. Failure to exclude revenue on which Sirius XM does not pay royalties would result in Sirius XM paying less than [REDACTED] per subscriber. Therefore, revenue attributable to pre-1972 recordings should not be included in the ARPU number used to translate the [REDACTED] per subscriber rate into a percentage of revenue rate.

When Gross Revenues are adjusted to exclude any revenue that Sirius XM attributes to pre-1972 recordings, the resulting ARPU is [REDACTED] and the appropriate percentage of revenue rate

³ See Initial Determination at 111; Written Merits Opening Submission of Sirius XM Radio Inc., Docket No. 2006-1 CRB DSTRA (2007-2012), at 8-9 (July 29, 2016) (“Sirius XM Opening Merits Submission”).

is 16.85%. Because the Judges expressly asked each party to identify the “royalty rate (between 14.7% and 15.5% inclusive) that the party alleges to be appropriate,” Order at 9, and because the mathematically and conceptually accurate rate exceeds that range, SoundExchange maintains that the Judges should not reduce the 15.5% rate established in the Initial Determination.

ARGUMENT

I. In light of the Judges’ regulatory clarifications and the use of walk-away opportunity cost to set a rate, a 15.5% percentage of revenue rate will, if anything, shortchange artists and copyright owners their [REDACTED] per-subscriber opportunity cost.

A. The ARPU calculation must ensure that copyright owners receive at least their opportunity cost of [REDACTED] per subscriber.

The Judges based their Initial Determination on a finding that copyright owners’ and artists’ per-subscriber opportunity cost of a hypothetical license to Sirius XM is [REDACTED]. Initial Determination at 41-45, 57. That [REDACTED] per subscriber reflects “what a must-have single record label would earn elsewhere” and, hence, what a must-have label would demand and receive from Sirius XM in exchange for a license equivalent to the statutory license, were the parties negotiating in a hypothetical unregulated market. *Id.* at 42-43 (emphasis omitted).

Given the Judges’ conclusion that the statutory rate should be set at a level that compensates creators at least [REDACTED] per subscriber per month, the question remains how to devise a percentage of revenue rate that will ensure that happens. The Judges have held that “the ARPU used in the royalty rate ratio must be commensurate with the Gross Revenues definition that the Judges applied.” Order at 8. The reason for this is straightforward. In order to convert the [REDACTED] per-subscriber opportunity cost of the statutory license into a percentage of revenue rate, the Judges have no choice but to divide [REDACTED] by a fixed ARPU. But if Sirius XM subsequently multiplies

that resulting percentage rate against a differently calculated revenue base, or takes a mathematically equivalent “below the line” deduction, creators will not receive the monthly [REDACTED] per subscriber opportunity cost occasioned by the statutory license.

Sirius XM moved for rehearing on the grounds that the ARPU utilized by the Judges was incorrect because it failed to add back the transaction expenses and bundled package revenue that Sirius XM improperly deducted from Gross Revenues when calculating past royalty payments. As a conceptual matter, if the Judges are inclined to revisit ARPU, then it is appropriate for these sums to be included in the ARPU calculation, provided that Sirius XM actually pays royalties on these amounts during the *SDARS III* rate period. *See infra* Part III (discussing uncertainty generated by Sirius XM’s appeal of the bundled package issue to the D.C. Circuit). But Sirius XM has failed to follow through on its own logic. In the very same ruling that Sirius XM cites in its motion for rehearing, the Judges *also* clarified that, for the *SDARS I* rate period, revenue attributable to performances of pre-1972 recordings *is not* royalty bearing. Ruling on Referral at 17. The Judges stated that, “the language of the subsection (3)(vi)(D) exclusion [in Gross Revenues] clearly embraces revenue properly attributable to the performance of pre-’72 recordings.” *Id.* at 16. They wrote that there is nothing in the regulatory text that would “preclude an exclusion of revenue from pre-’72 recordings.” *Id.* at 17.

The mechanism by which Sirius XM has excluded pre-1972 performances from its royalty calculations has changed over time. In the *SDARS I* period, Sirius XM took this exclusion by subtracting what it contends was a corresponding amount of revenue from its Gross Revenues calculation. For the *SDARS II* and *SDARS III* periods, the regulations have permitted a “below the line” deduction from Sirius XM’s gross royalty exposure. Though the method for the pre-1972

exclusion has changed over time, the economic result has been the same, a fact that Sirius XM has acknowledged. *See* Sirius XM Opening Merits Submission at 8 (arguing that Sirius XM’s “*pro rata* method of calculating the pre-1972 revenue exclusion” during *SDARS I* “was fundamentally equivalent to the deduction the Judges later specified, in their *Satellite II* ruling, as the proper method for doing so – and yielded substantially the same economic results”); Written Merits Rebuttal Submission of Sirius XM Radio, Inc., Docket No. 2006-1 CRB DSTRA (2007-2012), at 10-11 (Aug. 31, 2016) (“[T]he logic (and law) undergirding the *Satellite II* deduction for pre-1972 transmissions was not ‘new’ to that period, but was in fact the same as expressed by the Judges in *Satellite I*: that the revenue included under the Gross Revenues definition should ‘unambiguously relate’ to the performances covered by the statutory license.”). In fact, Sirius XM’s statements of account continue to reflect the pre-1972 deduction as a reduction of revenue.⁴

Regardless of the method used, the Judges have held that Sirius XM’s statutory royalties should be calculated without reference to revenue attributable to pre-1972 performances, as those performances are non-royalty bearing.⁵ The upshot for present purposes is clear. The Judges have said, and Sirius XM does not dispute, that “when converting per-subscriber ratios into percent-of-

⁴ *Compare* Trial Ex. 150 (tab “SOA”) *with id.* (tab “SX Summary Dec-15”) (showing that Gross Revenues reported by Sirius XM to SoundExchange reflect a deduction of revenue that Sirius XM attributed to the performance of pre-1972 and directly licensed recordings).

⁵ The *SDARS II* and *SDARS III* regulations permit a similar deduction for direct licenses. It is appropriate to include revenue associated with usage under direct licenses in ARPU, because the direct license deduction is calculated based on the use of post-1972 recordings only, and so has a scope coextensive with the statutory license. *See* 37 C.F.R. § 382.12(d)(4); Initial Determination at 128 (new § 382.23(a)(3)). The direct license deduction simply recognizes that direct licensors recover their opportunity cost of licensing post-1972 recordings to Sirius XM through their direct licenses, rather than through the statutory royalty.

revenue royalty rates, it [is] imperative that the ARPU used in the denominator of the calculation be commensurate with the ARPU that would flow from the Gross Revenues definition actually adopted by the Judges going forward” Order at 8 (internal quotation marks omitted). The Judges have clarified that pre-1972 revenue is not included in the ARPU that flows from the Gross Revenues definition (whether by operation of an above-the-line exclusion or an equivalent below-the-line deduction). Because pre-1972 revenue is not included in the calculation of statutory royalties, pre-1972 revenue should *not* be included in the ARPU used in the denominator of the percentage of revenue calculation.

The rest is a question of simple arithmetic, which can be accomplished using the same data relied on by Sirius XM in its motion for rehearing. *See* Sirius XM’s Mot. for Rehearing at 5-7 & Ex. C. In an effort to simplify the math, SoundExchange has re-created Exhibit C to Sirius XM’s Motion for Rehearing. *See* Ex. A. Rows (a) through (d) of the parties’ Exhibits are identical. These rows draw on data from Trial Exhibit 149 to show Sirius XM’s Gross Revenues before and after “new” buckets of revenue are included (corresponding to bundled subscription packages and transaction fees).⁶

SoundExchange’s Exhibit A then takes the next logical step. In row (e), SoundExchange identifies the revenue associated with pre-1972 performances that Sirius XM has routinely

⁶ Because discovery in this proceeding has long since closed, SoundExchange has no option but to rely on Sirius XM’s numbers for purposes of this rehearing. SoundExchange does not concede the accuracy of these numbers for the purposes of any other proceeding (including the underpayment cases, which remain pending). SoundExchange also does not concede that these numbers are representative of any other period of time.

deducted before paying royalties to SoundExchange.⁷ See Ex. A. In row (f) of Exhibit A, SoundExchange identifies Gross Revenues after taking into account *all* of the relevant inclusions *and exclusions* mandated by the Judges' recent rulings. When this number is divided into the total number of subscribers utilized by the parties during the proceeding, the resulting ARPU is [REDACTED]. When that [REDACTED] is divided by the [REDACTED] per-subscriber opportunity cost of licensing post-1972 recordings to Sirius XM, the resulting percentage of revenue rate is 16.85%.

B. There is no manifest injustice to Sirius XM because, at the current rate of 15.5%, copyright owners already will receive less than their opportunity cost of [REDACTED] after Sirius XM avails itself of a deduction for pre-1972 recordings.

As noted, the Judges determined that Sirius XM owes copyright owners and artists [REDACTED] per subscriber in royalties for its usage of sound recordings within the scope of the statutory license. Sirius XM claims in its rehearing motion that the ARPU number accepted by the Judges in their Initial Determination – and the corresponding percentage of revenue rate – must be recalculated to maintain the “integrity” of that [REDACTED] per-subscriber fee. Sirius XM’s Reply in Support of Mot. for Rehearing at 1. And it complains that “the economic effect of this error [an ARPU number that in Sirius XM’s estimation is too low] is to supplant the [REDACTED] per subscriber royalty the Judges determined to be the reasonable sum with a windfall recovery of at least [REDACTED] per subscriber royalty based solely on changes to the Gross Revenues definition.” Sirius XM’s Mot. for Rehearing at 3.

⁷ This data is also sourced from Trial Exhibit 149, specifically a tab labeled “SoundExchange” that identifies the percentage deduction taken by Sirius XM for pre-1972 recordings (called “PD” or “public domain” in Sirius XM’s parlance). That deduction hovers between [REDACTED].

The reality is otherwise. Even at the royalty rate of 15.5% calculated by the Judges in the Initial Determination, SoundExchange will receive the equivalent of [REDACTED] per subscriber in royalties if Sirius XM takes a below-the-line pre-1972 deduction.⁸ This amount is less than the [REDACTED] opportunity cost that the Judges have found copyright owners and artists incur as a result of the statutory license. This means that Sirius XM will be able to exploit creators' post-1972 recordings for a price that is [REDACTED] per subscriber less than the minimum royalty the creators would insist upon in a hypothetical free market. *See* Initial Determination at 42; 5/2/17 Tr. 2019 (Willig).

If ARPU were re-calculated as Sirius XM suggests, this underpayment would grow: If the royalty rate was lowered to 14.7%, SoundExchange would receive only the equivalent of [REDACTED] per subscriber, rather than [REDACTED], after Sirius XM takes the pre-1972 deduction pursuant to the current regulations.⁹ By contrast, a rate of 16.85% would produce the equivalent of [REDACTED] per subscriber after the pre-1972 deduction.¹⁰

Sirius XM's effort to reduce the rate below 15.5% is particularly unjust because a rate calculated to compensate record companies for opportunity cost, and no more, already allows Sirius XM to capture *all* of the surplus value generated by an agreement, notwithstanding any bargaining power that the record companies might have in arms-length negotiations. *See* Initial Determination at 63-64. Forced to sell to Sirius XM under the statutory license, record companies

⁸ As explained *supra* at 7-8, removing from the ARPU calculation the revenue Sirius XM associates with pre-1972 sound recordings produces an ARPU of [REDACTED]. ARPU of [REDACTED] times a rate of 15.5% equals [REDACTED] per subscriber.

⁹ ARPU of [REDACTED] times a rate of 14.7% equals [REDACTED] per subscriber.

¹⁰ ARPU of [REDACTED] times a rate of 16.85% equals [REDACTED] per subscriber.

should at the very least recoup the opportunity cost of the compulsory license. Given that a 15.5% royalty rate fails to cover the opportunity costs that labels incur by licensing to Sirius XM rather than to other services, it cannot possibly be said that such a rate creates any manifest injustice *for Sirius XM*.

C. The opportunity cost approach to rate-setting, in contrast to the benchmarking approach used in the past, requires the Judges to reconsider the impact of the deduction for pre-1972 recordings.

Sirius XM may argue that calculating ARPU without including revenue associated with pre-1972 recordings is tantamount to removing the pre-1972 deduction and requiring that Sirius XM pay for pre-1972 recordings, even though such recordings are not covered by the statutory license. But that is a red herring. The question is not whether Sirius XM should pay SoundExchange for pre-1972 recordings, but how much Sirius XM should pay to exploit the post-1972 recordings covered by the statutory license. And the answer to that question, as established in the Initial Determination, is the equivalent of [REDACTED] per subscriber.

Importantly, the Judges' approach to setting the rate in this case materially differs from its approach in prior SDARS cases. In the past, a benchmarking approach was used, whereas here the Judges employed an opportunity cost approach. As Sirius XM has argued, the benchmark agreements used in prior cases covered both pre-1972 and post-1972 recordings. Accordingly, after the Judges calculated a per-subscriber rate based on the benchmark agreements, the Judges concluded that a further adjustment was necessary to account for the fact that, unlike in the benchmark agreements, Sirius XM obtains only the rights to post-1972 recordings under the

statutory license.¹¹ Thus, Sirius XM contended that in *SDARS I*:

[T]he music benchmarks from the interactive services used in the calculations – the above-mentioned \$1.40 per month – were drawn from repertory-wide voluntary licenses covering both pre- and post-72 recordings. [Citations omitted]. The Judges’ rate calculations from such agreements made no downward adjustment to account for the fact that the benchmark payments covered a broader set of recordings (both pre-1972 and post-1972) than the statutory license (post-1972 only). Given this difference, it was totally appropriate for the Judges to create an exemption allowing Sirius XM to deduct revenue for pre-1972 transmissions, since their exemption under the statutory license was not already reflected in the rate itself.¹²

Here, in contrast, the opportunity cost represents the cost to the copyright owners of granting the statutory license covering post-1972 recordings. As Professor Willig described it, opportunity cost is “compensation that [a record company] would earn from other sources of distribution” if it were to walk away from negotiations over a license for the rights at issue here. *See* Initial Determination 42. The underlying logic of Professor Willig’s analysis was that Sirius XM needs a license from each of the major record companies, and without such licenses Sirius XM would no longer exist and its subscribers would migrate to other sources of music, many of

¹¹ Professors Lys and Orszag included pre-1972 revenue in their calculations of ARPU consistent with the fact that SoundExchange’s rate theory at the time was significantly based on benchmark agreements that included licenses of pre-1972 recordings. Lys WRT at ¶ 155; Orszag Amended WDT at D-1. The Judges did not adopt this approach. Instead, the Judges decided to base their determination on the opportunity cost of a hypothetical license of statutory scope. This requires a different approach to the treatment of revenue attributable to pre-1972 recordings, as such revenue falls outside the scope of the statutory license and hence is not part of the opportunity cost that labels incur.

¹² Written Merits Rebuttal Submission of Sirius XM Radio, Inc., Docket No. 2006-1 CRB DSTR (2007-2012), at 8 (Aug. 31, 2016) (emphasis omitted).

which pay royalties exceeding those paid by Sirius XM.¹³ No one has suggested that Sirius XM could successfully offer its service using only the pre-1972 recordings that Sirius XM contends are in the public domain¹⁴ and without the post-1972 recordings subject to the statutory license. Thus, the opportunity cost of granting a statutory license covering post-1972 recordings is [REDACTED], and no further deduction is needed to account for the fact that Sirius XM need not pay SoundExchange for pre-1972 recordings under federal law. [REDACTED] per subscriber is the opportunity cost of the license for sound recordings covered by the statutory license, full stop.

Even if one were to conclude that the opportunity cost calculated by the Judges covers the cost of licensing all of a record company's sound recording catalogue – pre- and post-1972 – the result should not change. Suppose, for example, that a record company assessed its opportunity cost of granting a license for its entire catalogue at [REDACTED] per subscriber. Suppose further that it was told no royalty payment would be made for the pre-1972 portion of its catalogue. In that event, the record company would still insist on receiving [REDACTED] per subscriber for the post-1972 portion of its catalogue, because that is the minimum it would need to offset the opportunity cost of the license.

As discussed previously, at a rate of 15.5%, copyright owners will receive only [REDACTED] per subscriber after Sirius XM takes the pre-1972 deduction currently embodied in the regulations. Assuming opportunity cost encompassed both pre- and post-1972 recordings, then Sirius XM

¹³ The Judges have found that “[t]he evidence in this proceeding strongly demonstrates the ‘must-have’ status of each Major.” Initial Determination at 43 n. 81.

¹⁴ The copyright owners do not accept Sirius XM's contentions with respect to the legal status of pre-1972 sound recordings.

would have to separately license pre-1972 recordings at a rate of [REDACTED] per subscriber in order for copyright owners to receive the [REDACTED] opportunity cost identified by the Judges. [REDACTED] per subscriber is the equivalent of an approximately 9% of revenue royalty rate for pre-1972 recordings.¹⁵ The problem is that Sirius XM has not agreed to pay 9% of revenue for pre-1972 rights, or anything close to it. In its settlement of a class action by certain owners of pre-1972 copyrights, Sirius XM agreed to pay between 0% and 5% of revenue for pre-1972 recordings, depending on the outcome of state court litigation over the existence of state-law copyrights covering such recordings.¹⁶ Sirius XM represented that this was a market rate.¹⁷ [REDACTED]

[REDACTED].¹⁸

In short, even if the opportunity cost is deemed to encompass both pre- and post-1972 recordings, the rate of 15.5% set in the Initial Determination will not cover the copyright owners' opportunity cost unless Sirius XM suddenly agrees to (a) separately license the pre-1972

¹⁵ For each month between January and June 2016, Sirius XM attributed, on average, [REDACTED] of revenue to the performance of pre-1972 recordings. *See* Ex. A (Row (e) from Column "Total: Jan-Jun" divided by six months). Dividing this number by Sirius XM's monthly subscribers yields an average pre-1972 revenue per user of [REDACTED]. [REDACTED] per subscriber divided by this pre-1972 ARPU yields a percent of revenue rate of 9%.

¹⁶ *See* Trial Ex. 675 (Class Action Settlement) at Part IV.B.

¹⁷ *See* Trial Ex. 675 (Class Action Settlement) at Part IV.C.2.

¹⁸ Trial Ex. 642 at SXM_DIR_00001062 and SXM_DIR_00001046 ([REDACTED]). SoundExchange does not agree that Sirius XM's direct license agreements reflect a market rate for pre-1972 recordings. While SoundExchange believes that a substantially higher rate for pre-1972 recordings is appropriate, the point for present purposes is that Sirius XM has not agreed to pay for pre-1972 recordings at a rate that would cover opportunity cost.

recordings that it currently claims are in the public domain and (b) pay a far higher rate for such sound recordings than the record suggests it will. In these circumstances, lowering the 15.5% rate established in the Initial Determination would be manifestly unjust to the copyright owners, who will be forced to license their sound recordings at substantially less than their opportunity cost.

II. The Judges should reconsider their conclusion that Sirius XM satisfied the manifest injustice standard in light of new D.C. Circuit precedent.

In deciding motions for rehearing, the Judges have “expressly adopted the standard for reconsideration of an order by federal district courts” under Federal Rule of Civil Procedure 59(e). Order at 2. However, in initially addressing Sirius XM’s motion for rehearing, the Judges did not have the benefit of thorough briefing concerning the standard applicable to motions under Rule 59(e) and, more specifically, to manifest injustice claims. Instead, they were forced to rely on truncated papers that addressed numerous issues within the limited space permitted by the regulations governing motions for rehearing in this proceeding. *See* 37 C.F.R. § 353.2. As a result, the Judges again relied on *Fresh Kist Produce v. Choi Corp.*, 251 F. Supp. 2d 138, 140 (D.D.C. 2003), a decision issued in 2003. Order at 2, 7.

Importantly, the D.C. Circuit recently revisited the standard applicable to manifest injustice claims, providing an explanation that is more detailed, more instructive, and in any case more authoritative than the district court’s decision in *Fresh Kist Produce*. That case, *Leidos, Inc. v. Hellenic Republic*, 881 F.3d 213 (D.C. Cir. 2018), was decided the week after the Participants in this proceeding completed their briefing of the rehearing motions. It confirms that Sirius XM cannot establish manifest injustice under relevant law and, thus, that the royalty rate should not be reduced below 15.5%.

In *Leidos*, a contractor obtained an arbitral award requiring the nation of Greece to pay €39,818,298. *Id.* at 215. The contractor did not seek to convert this judgment into dollars at any point during the arbitration, nor during the subsequent litigation seeking to enforce the award. *Id.* at 215-16. But after a final district court judgment was entered, the contractor moved to modify the judgment, citing the “manifest injustice” of obtaining an award in Euros—which had become \$11.9 million less valuable due to an intervening decline in the Euro’s value. *Id.* at 216. Notwithstanding the economic impact (approximately 200 times that at issue in *Fresh Kist Produce*), the D.C. Circuit held that there was no manifest injustice sufficient to warrant amending the district court’s judgment. *Id.* at 215. As set forth below, the court reached this conclusion for several reasons that are applicable here and establish that Sirius XM is not entitled to relief under the Rule 59(e) standard adopted by the Judges.

In its *Leidos* decision, the D.C. Circuit observed that the manifest injustice standard “is not available to a party who could have easily avoided the outcome, but instead elected not to act until after a final order had been entered.” *Id.* at 217 (internal quotation marks omitted). The D.C. Circuit also observed that the manifest injustice standard “may not be used . . . to raise arguments or present evidence that could have been raised prior to the entry of judgment.” *Id.* Applying these standards, which are firmly grounded in Supreme Court precedent,¹⁹ the D.C. Circuit said that the contractor “did not suffer any ‘manifest injustice’ in receiving the relief it had explicitly and consistently requested.” *Id.* at 218. Multimillion dollar stakes notwithstanding, the

¹⁹ As the Supreme Court has emphasized: “Rule 59(e) permits a court to alter or amend a judgment, but it may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.” *Exxon Shipping v. Baker*, 554 U.S. 471, 486 n.5 (2008) (quoting 11 C. Wright & Miller, *Federal Practice and Procedure* 2810.1, pp 127-128 (2d ed. 1995)); *accord* Order at 2.

contractor's "request could have—and should have—been made long before judgment was entered." *Id.* (internal quotation marks omitted). The court concluded that a party cannot claim manifest injustice to obtain relief from its own tactical decisions.

The language of *Leidos* precisely describes this case. Sirius XM is not entitled to relief on the basis of manifest injustice because it made exactly the kind of tactical election that the *Leidos* court explained is disqualifying. As the Judges held, "Sirius XM was fully aware and on notice of any potential impact the Judges' interpretation [of the Gross Revenues definition] might have on its calculation of ARPU in the present proceeding." Order at 4. Accordingly, at the hearing, "Sirius XM could have calculated an ARPU it believed to be appropriate under [the] *status quo*." Order at 5. Sirius XM was derelict in its duty to do so, and instead adopted the [REDACTED] figure. Order at 4-5. Sirius XM does not deny that its decision to adopt the [REDACTED] ARPU, and refrain from calculating its now-favored ARPU, was tactical. Order at 5. Because Sirius XM was aware of the prevailing revenue definition and, for strategic reasons, chose to refrain from presenting its now-favored ARPU, it cannot seek relief under the manifest injustice standard as explained by the D.C. Circuit. *See Leidos*, 881 F.3d at 216.

To the extent *Fresh Kist* remains an instructive lower court ruling, it is not to the contrary. In *Fresh Kist*, the plaintiff explicitly requested that a court apply pre-judgment interest in calculating an award. 251 F. Supp. 2d at 141. However, the plaintiff failed adequately to detail the request or provide legal support for it. *Id.* The plaintiff corrected that issue in its Rule 59(e) motion, presenting a legal argument in support of the request for pre-judgment interest. *Id.* The Court elected to consider that argument. *Id.*

The circumstances in *Fresh Kist* were very different from those that now face the Judges. The plaintiff in *Fresh Kist* affirmatively sought pre-judgment interest and simply failed to provide adequate support for its request. In stark contrast, Sirius XM made an affirmative decision to *avoid* asking the Judges to calculate its now-favored ARPU. Sirius XM's gamesmanship bears no resemblance to the conduct in *Fresh Kist*. Because Sirius XM effectively waived the argument it presses on rehearing, it has not suffered "clear and certain prejudice" from the Judges' failure to consider that argument, and the royalty rate established in the Initial Determination is not "fundamentally unfair in light of governing law." *Leidos*, 881 F.3d at 217.

Finally, in evaluating whether a judgment should be revisited for "manifest injustice," the D.C. Circuit has indicated that it is necessary to assess potential prejudice to both the moving *and* non-moving parties. *Id.* at 219. In *Leidos*, the D.C. Circuit found that the contractor's delay in seeking a judgment in dollars had prejudiced Greece, which had no "notice of a need to guard against currency fluctuation" and which otherwise "could have bought a dollars-to-euros futures contract" to hedge this risk. *Id.* Allowing Sirius XM to repudiate its adopted ARPU after the end of the proceeding will result in comparable harms to SoundExchange. Had SoundExchange known that Sirius XM's ARPU recalculation was on the table, it could have and would have built a more complete record during discovery and presented expert testimony regarding Sirius XM's new number. Instead, SoundExchange and the Judges are left with no option but to accept Sirius XM's data from an arbitrary period two years ago, without the benefit of expert opinion concerning the details now being raised. This is a substantial deprivation, but it is not the only one. SoundExchange is likewise prejudiced by the selective nature of the rehearing. As discussed in SoundExchange's opposition to Sirius XM's motion for rehearing, conceptual testimony and data

in the record supports an upward revision of opportunity cost on the basis of errors in Professor Hauser's "Modified Dhar" survey. *See* SoundExchange's Opp. to Sirius XM's Mot. for Rehearing at 4-5. The magnitude of this upward revision could be calculated easily. Forgoing it, while undertaking a similar effort to be more precise about ARPU, imposes clear and certain prejudice on SoundExchange.

* * *

The Judges have already elaborated on the many reasons why Sirius XM could have, and should have, presented its alternative ARPU calculation. *See* Order at 3-6. The D.C. Circuit's most recent word on the "manifest injustice" standard makes clear that, for those very reasons, there is no basis to revisit the royalty rate set forth in the Initial Determination. *See Leidos*, 881 F.3d at 216-218; *see also id.* at 217 (noting that the amendment of a judgment is "an extraordinary measure"). The royalty rate should not be reduced below 15.5%.

III. The Judges should decline to adopt an ARPU calculation that includes bundled package revenue unless and until Sirius XM commits to paying SoundExchange royalties on this revenue.

Sirius XM is in the process of appealing the Judges' Ruling on Referral to the D.C. Circuit. Sirius XM's preliminary statement of issues indicates that it is appealing, among other issues, "[w]hether the CRB's Ruling is unlawful and should be set aside because it ruled that a clearly identified, additional upcharge for the premium non-music channels was not 'separate' from the price paid for Sirius XM's underlying standard programming package" as well as "[w]hether the CRB's Ruling is unlawful and should be set aside because it failed to provide understandable guidance as to when revenue for Sirius XM's premium non-music channels can or cannot be excluded." Appellant Sirius XM Radio Inc.'s Prelim. Statement of Issues, *Sirius XM Radio Inc. v. Copyright Royalty Board and Librarian of Congress*, No. 17-1278 (D.C. Cir. Feb. 1, 2018). Opening briefs are due on June 26, 2018, and it is unlikely the case will be argued until the late fall.

Plainly, Sirius XM seeks to have its cake and eat it too. It seeks to reduce its royalty obligations during the *SDARS III* period on the basis of the Judges' Ruling on Referral. At the same time, it seeks to overturn that very same ruling through its D.C. Circuit appeal.²⁰ If Sirius XM succeeds in having the royalty rate reduced here, and is also successful in its appeal, the result will be profoundly unfair. Accordingly, the Judges should not adjust the 15.5% royalty rate to reflect payment of the "bundled package" revenue unless Sirius XM states unambiguously in its

²⁰ Although Sirius XM may claim that its pending appeal does not formally relate to the *SDARS III* period, the part of the definition of Gross Revenues giving rise to the parties' dispute concerning bundled packages will continue in effect for the *SDARS III* rate period. Thus, a challenge to the Judges' interpretation of this regulatory language is relevant to the *SDARS III* period, as well as other periods.

reply brief that it will withdraw its appeal of the Ruling on Referral.

CONCLUSION

For the foregoing reasons, SoundExchange respectfully requests that the Judges maintain the 15.5% rate set forth in their Initial Ruling.

Respectfully submitted,

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Dated: May 15, 2018

EXHIBIT A

Public Version

**Exhibit A is restricted (under the Protective Order) in its entirety
and is therefore omitted from this public version.**

CERTIFICATE OF SERVICE

I, David A. Handzo, do hereby certify that, on May 15, 2018, copies of the foregoing are being filed via eCRB and sent via electronic mail to all parties at the email addresses listed below.

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Dated: May 15, 2018

/s David A. Handzo

Certificate of Service

I hereby certify that on Tuesday, May 15, 2018 I provided a true and correct copy of the Brief in Response to the Judges' April 17, 2018 Order to the following:

Johnson, George, represented by George D Johnson served via Electronic Service at george@georgejohnson.com

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Signed: /s/ David A. Handzo